No. 83-672

IN THE

Supreme Court of the United States

October Term, 1983

FREDERICK E. ALTHISER, *et al.*,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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Question Presented

Whether the Court of Appeals was correct in upholding the settlement of this Title VII action where a *prima facie* case of discrimination had been established by a statistical demonstration of disproportionate racial impact, and where the terms of the settlement were both reasonable and in accord with federal law.

Parties in Courts Below

The parties to the proceedings below, in addition to those named in the caption, include the following named plaintiffs-appellees: Edward L. Kirkland, Joseph P. Bates, Sr., and Arthur E. Suggs, each individually and on behalf of all others similarly situated.

The following named defendants-appellees:

Thomas A. Coughlin III, individually and in his capacity as Commissioner of the New York State Department of Correctional Services, the New York State Civil Service Commission, Joseph Valenti, individually and as President thereof and as a Civil Service Commissioner, Josephine Gambino and James McFarland, individually and in their capacity as Civil Service Commissioners;

The following named intervenors-appellants, respondents herein:

Robert McClay, Ray Smith, Charles Mutz, Gary Bartlett, Bob Pressel. L. Kinney, Gene Vanover, Herbert Jones, Larry George, Raymond Peters, Gordon Wells, Donald Carey, R. Vissmer, P. Buffalo, S. Delsanto, J. O'Rourke, R. Weed, D. Butterton, T. Brooks, James Bonnell, Jr., Ronald Krom, Wayne Elberth, Paul Borko, Ken Curry, John Higgins, Ronald Kurz, George Ribas, Mark Reeves, Joseph Mitchell, Al Luning, Ronald Kelly, Arthur Shuts, E. Hanscom, R. Wilson, V. Scott, V. Dunn, C. Harvey.

The following named intervenors-appellants, petitioners herein:

Paul W. Annetts, Edward T. DeVoe, Robert G. Knapp, William C. Badger, Elwyn M. Dickson, Lewis J. Kordyl, Jr., Arlo G. Baker, Anthony J. DiDonna, Marvin Kushner, Philip Barbarello, Edward R. Donnelly, Edward R. LaDuke, John A. Battista, Richard P. Donohue, Garry J. LaVarnway, Edward J. Beauchemin, Donald J. Dunn, David Lavigne, Robert L. Bennett, William Eddy, Morton D. Lawliss, James E. Berg, Carl Edwards, James H. Layhee, Ronald D. Besimer, Kenneth Eissing, George Liberty, John F. Bickford, Paul E. Ellsworth, Joseph Michael Liffland, Allen F. Blades, William H. Eull, Aelred F. Lippold, Howard Block, Ludirck E. Fabian, Elendo J. Lombardi, John O. Block, John Festa, Robert E. Mahoney, Ronald E. Bodge, Thomas R. Fish, Richard P. Malark, Wilbert Boileau, Peter J. Fitzgerald, Francis R. Maloney, Charles William Bowes, Thomas R. Fitzgerald, Howard Maneely, Harmon Boyd, Henry L. George, George W. Manor, Marilyn J. Bradt, John F. Gilsenan, John McCabe, Robert Butchino, Orville J. Gload, Robert J. McClellan, Carl C. Caldwell, Kenneth J. Goeway, Russell J. McClennan, Alexander D. Campbell, Richard W. Gordon, Patrick B. McGee, Thomas E. Canning, Alan A. Gratto, Gordon C. Melville, Winifred V. Carron, Daniel B. Green, John T. Miner, Richard A. Cherry, Melvin R. Greenfield, Gary L. Mitchetti, Norman W. Christian, James C. Haight, James H. Morgan, Lois B. Coffey, Charles J. Hamel, Ferenc Morvai, Ismael C. Colon, James H. Handlin, Jr., Ronald W. Moscicki, Clarence William Colwell, Neil Harris, H.J. Mulhall, Dennis M. Conroy, Ronald D. Haseltine, Carl A. Nico, James T. Conway, Thomas Heffernan, Gary C. Nolan, William L. Corlew, Roy W. Henneberg, Ronald R. Norton, Fred R. Coutant, Hugh P. Hicks, Louis Padilla, Wayne L. Cuer, Dennis E. Hoff, Max A. Palmer,

Joseph DeCaterina, Bruce A. Kessler, Wilfred V. Parotte, Andrew J. DeGaust, Robert J. Kirby, Melvin A. Pavquette, Jr., Richard Delany, Frank Kisch, Daniel M. Pelton, Daniel L. Denkenberger, Harry E. K. Ages, Keith D. Perkings, Thomas P. Devlin, Jr., Charles A. Kline, Walter F. Pitt, Brian Pleace, Robert M. Semski, Gary Tauurmins, Allyn D. Plowe, John Senchack, Neil A. Terwilliger, Richard S. Pochintesta, David A. Sharp, Francis W. Tessier, James L. Pollack, Arthur P. Sheets, Dennis Thompson, William D. Poole, Joseph H. Sheldon, James Tompkins, Doughlas W. Powers, John M. Sherlock, Robert J. Tyrell, Roebrt E. Racette, Harvey Jay Singer, Augustine E. VanOrden, John R. Rafferty, James C. Sipe, Roger N. Walker, Leonard Fred Rayce, Francis J. Sluka, Conrad K. Walter, Wal- C. Rathbun, Ronald C. Skinner, David W. Walsh, ter Redgate, Larry D. Smith, Jack Weiman, Walter J. Rivers, Warren Smith, Betty J. Welch, Stanley M. Rushford, Norman Steinhilber, Milo Williams, Charles T. Ryan, Arthur J. Steinhofer, Ralph J. Wolcott, Dennis Ryan, William J. Stiles, Donald R. Wolff, George R. Schmidt, Harold L. Streigold, Arthur Wood, Patsy J. Sciarra, Paul F. Stringham, Norman M. Zelinsky, William G. Scott, John M. Sullivan.

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Statement of the Case

In October, 1981, a written examination for the title of Correction Lieutenant in the New York State Department of Corrections Services ("Corrections"), Examination No. 36-808, was administered by the New York State Department of Civil Service ("Civil Service"). An eligible list, based on that examination, was published in December, 1981. Plaintiffs, three black Correction Sergeants (respondents here), brought this action in January, 1982,

against agencies and state officials (respondents here) on behalf of themselves and other black and Hispanic minorities who sat for the examination in question. Plaintiffs alleged that use of the examination discriminated against minorities.

Litigation History of Examinations for Corrections Supervisory Security Titles

A review of the past ten years of litigation concerning examinations for Corrections supervisory security titles is necessary for a full understanding of the case.

In 1972, Civil Service administered a written test for the position of Correction Sergeant. In 1974, the United States District Court for the Southern District of New York (Lasker, J.) held that the Sergeant's examination unconstitutionally discriminated against minorities, as it had an adverse racial impact and was not adequately validated. *Kirkland* v. *New York State Department of Correctional Services,* 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part, rev'd in part,* 520 F.2d 420 (2d Cir.), *reh. en banc denied,* 531 F.2d 5 (1975), *cert. denied,* 429 U.S. 823, *reh. denied,* 429 U.S. 1123 (1976) ("Kirkland Sergeants").* The district court ordered defendants to develop new selection procedures to be validated by means of an empirical, criterion-related validation study.

* The full citation is *Kirkland* v. *New York State Department of Correctional Services,* 358 F. Supp. 1349 (S.D.N.Y. 1973) (mtn. to dsms or change venue den.), 374 F. Supp. 1361 (1974), unreported order dated 7/14/74 granting motion to intervene by Ribiero and Coons, but denying intervenors class status, 374 F. Supp. 1361, *aff'd* in part, rev. in part, 520 F. 2d 420 (2d Cir.), reh. en banc den., 531 F. 2d 5 (1975), cert. den. 429 U.S. 823, reh. den. 429 U.S. 1123 (1976), 482 F. Supp. 1179 (S.D.N.Y. 1980) (approving relief exam on pltfs. and defts. for summy judmt), *aff'd* 628 F. 2d 1214 (S.D.N.Y. 1981) pltfs. mtn. for atty. fees against intervenors den.).

Between 1974 and 1979, the selection procedures required by the district court were developed and administered. The final selection procedures consisted of both a written examination and performance evaluation. A criterion validation study was performed which showed that minorities characteristically performed less well than non-minorities on the selection procedures, but that this difference was not reflected in differences in job performance. In light of these analyses the district court found that use of the test as originally scored would be unfair and, therefore, that the use of the selection procedures should be revised. *Id.* 482 F. Supp. 1182 (S.D.N.Y. 1980). The manner of revision adopted by defendants, and approved by the district court, to assure fairness was the addition of 250 points to the final scores of minority candidates. The score adjustment was challenged by a group of non-minority intervenors, but the district court upheld the adjustment. *Kirkland Sergeants*, 482 F. Supp. 1179 (S.D.N.Y.), *aff'd*, 628 F.2d 796 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981).

In 1981, employees of the Department of Correctional Services successfully petitioned the Supreme Court of the State of New York, Albany County, for an order compelling Civil Service to administer competitive examinations for the positions of Correction Lieutenant and Correction Captain. *Matter of Edgerton*, 84 A.D. 2d 881 (3d Dep't 1981). Examination No. 36-808 for Correction Lieutenant was administered on October 3, 1981. Examination No. 37-526 for Correction Captain was administered on January 30, 1982.

The Correction Lieutenant Examination

The written examination for Correction Lieutenant was administered to 728 candidates. One hundred and sixty-eight (23%) of the candidates were minority candidates. Of the candidates, 92% of the white candidates passed the written test, while 86% of the black candidates and 92% of the Hispanic candidates similarly passed the test. An eligible list of approximately 670 persons was certified by Civil Service on December 23, 1981. While the overall minority representation on the list was approximately 22%, the minority representation was disproportionately low at the top of the list and disproportionately high at the bottom of the list. The final score on the certified list also included points for seniority and veterans' credits. The racial/ethnic breakdown of the list was:

Number of Persons in Order of Final Score	*% Min.*	*No. Min.*	*No. Non-Min.*
1-107	5.6	6	101
108-229	9.8	12	110
230-298	16.0	11	58
299-416	19.5	23	95
417-525	29.4	32	77
526-672	38.6	56	91

(A. 5a).*

By January, 1982, 171 appointments to the position of Correction Lieutenant had been made from the list. Of these appointments, 17 appointments, constituting approximately 10% of the appointments, were minority.

* Numbers preceded by "A" refer to pages of the Appendix; those preceded by "SA" refer to pages in the Supplemental Appendix.

The Stipulation of Settlement

This lawsuit was commenced by way of an order to show cause signed January 15, 1982. Plaintiffs claimed that the examination was discriminatory because: (i) it resulted in a disproportionately low number of minority appointments; (ii) the results of the examination determined who could sit for the Captain's examination; and (iii) the examination was not job related (A. 2f).

Between January 19, 1982 and January 21, 1982, based on numerous telephone conversations, a settlement in principle was reached between plaintiffs and defendants as to the administration of a new Captain's examination and the use of plaintiffs' expert to develop new examinations for Lieutenant and Captain. The only issue then left for discussion was the possibility of "accelerated" promotions of minorities to permanent Lieutenant (Horowitz Affidavit, p. 2). These discussions resulted in the motion being adjourned *sine die* (SA. 1-2).

However, on February 17, 1982, plaintiffs again sought a temporary restraining order from the district court, which the court refused to sign, setting the matter down for argument on February 26, 1982. The district court heard argument on that day on plaintiffs' motion for preliminary relief, and adjourned the matter to March 17, 1982 for the parties to engage in discovery to determine if the hearing on the motion could be consolidated with the trial. Defendants answered the complaint in March 1982, by claiming that the challenged examination was job related and had been validated as a content valid examination.

The parties then engaged in discovery. Interrogatories were served and depositions taken. On March 17 and again on May 11, 1982 there were further conferences with the court concerning the progress of discovery and the selection of a hearing-trial date.

During the course of discovery, settlement discussions were resumed and the parties were able to reach an agreement in May 1982. Petitioners wrote to the district court about their desire to seek intervention in June 1982. A conference was held in July 1982, at which the parties and counsel for petitioners were present and the terms of settlement were discussed. In August 1982, the parties entered into a stipulation of settlement which was submitted to the district court for approval (A. 5c).

The settlement first established procedures for making interim appointments to Correction Lieutenant from eligible list 36-808. It provides that:

1. All the individuals on the list will be divided into three zones. Each zone shall be deemed to be a single score for purposes of making appointments. The size of the zones was based on a statistical computation of the standard error of measurement as discussed in *Guardians Association of N.Y.C.* v. *Civil Service*, 630 F.2d 79 at pages 102-103 (2d Cir. 1980).

2. Appointments from the list shall be made first from zone 1, then from zone 2 and finally from zone 3.

3. Within each zone, appointments shall first be made from eligible minority candidates, if minority candidates are available and willing to accept appointment, until mi-

norities constitute at least 21% of all appointments. Thereafter, minorities will be appointed within a zone in a proportion of one minority to four non-minority. However, once minorities within a zone have been exhausted, appointments will be made from the non-minority candidates remaining within the zone.

4. All eligibles shall be offered appointment until the list is exhausted (A. 8-9f).

The settlement next establishes procedures for the development and use of new, long term selection procedures for future promotions to Correction Lieutenant and Captain. These procedures include consultation with an industrial psychologist designated by plaintiffs, consideration of alternatives to a written test, and the possible use of alternatives to a written test, and the possible use of separate frequency distribution (A. 10-13f).

Notice of the proposed settlement was given pursuant to Rule 23. On September 29, 1982, a hearing was held at which the district court permitted non-minorities who were on the eligible list to intervene for the purpose of objecting to the terms of the settlement. Additional hearings were held on October 4 and 14, 1982 (A. 3-4a).

On November 9, 1982, the district court issued its order approving the Stipulation of Settlement. The court found that the settlement was fair, reasonable and lawful in all respects and that the objections to the settlement were without merit (A. 1d).

An opinion of the court was issued on December 1, 1982. The court reviewed the racial makeup of the eligible list

and appointments made from the list as of July 28, 1982 and September 29, 1982.* It found that the list was 22% minority, and that of the 222 appointments made as of July 28, 1982, only 9% were minority. The court found the discrepancy between this percentage and the percentage of minority appointments to be expected from a random selection was almost 6 standard deviations, and noted that under the holding in *Castaneda* v. *Partida*, 430 U.S. 482 (1977) a difference of more than two or three standard deviations establishes a *prima facie* case of discrimination (A. 9-10c).

The district court then examined the terms of the settlement and found two basic elements: (1) measures to adjust the present list to correct for disproportionate racial impact, and (2) development of new selection procedures for future lists (A. 10c).

The district court found that the settlement was a logical outcome of the *Kirkland Sergeants* litigation and that the *Kirkland Sergeants* case provided clear precedent for settlement in this case. Specifically, the district court stated that the Court of Appeals' approval in *Kirkland Sergeants* of an interim hiring ratio for minorities, pending the development of a new selection procedure, and the interim hiring ratio for minorities achieved by the State's voluntary departure from a strict "rank order" list by adjustment of minority candidates' scores, was precedent for the departure from the strict rank order agreed to in this case (A. 13-14c).

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* As of July 28, 1982, 222 appointments had been made from the list, and twenty of these appointments were minority (9%). And, as of September 29, 1982, 225 appointments had been made, including 23 minority, or approximately 9% (A. 9-10c).

The district court then concluded that the settlement was reasonable, since the relief provided to the plaintiffs was modest and tailored to plaintiffs' claims. In this regard, the district court found that the original rank-ordered list was based on score differences so slight as to be meaningless vis-a-vis actual job performance, and that ranking according to zones was a more realistic use of test scores. The district court also found that although random-ranking within zones would result in a "color-blind" list, random-ranking would provide no remedy for the disproportionate number of non-minority appointments *already made*, and that after trial, those appointments might have been revoked—clearly a more drastic remedy than the limited minority preference provided for in the settlement (A. 14-16c).

The district court structured the balance of its analysis pertaining to the reasonableness and legality of the settlement around intervenors' objections. It summarized those objections as follows: *first*, that no affirmative relief can be granted until after a full trial at which plaintiffs prove disproportionate impact, and a judicial finding is made as to the job-relatedness of the examination; and *second*, that even if the existing record justified some relief, the minority preference violated the Federal Constitution and State Civil Service Law (A. 16-17c).

The court rejected intervenors' first contention, finding that, because settlement is favored and accorded a presumption of validity (A. 17-18c), the issue to be resolved when a Title VII settlement imposes some detriment on non-minorities, is whether there is a reasonable basis for imposing such detriment (A. 21c). The court found such a

reasonable basis in the adverse impact of the examination and in the nature of the terms of the settlement. Also, the court held, that there is no requirement that a defendant rebut a *prima facie* case (A. 21-22c). As for the terms of the settlement, the district court found that in settling the case, the State is, in principle, engaging in an affirmative action plan, and that no judicial determination of constitutional or statutory violation is required as a predicate for such action (A. 23-25c).

The district court then dealt with intervenors' second contention: that the settlement violated New York State and Federal Law. The court found that the establishment of zones does not violate State law concerning "merit and fitness" (A. 26c); also that the settlement does not violate intervenors' due process or equal protection rights. Specifically, the district court found that the New York Court of Appeals has held that a person on an eligibility list has no property right in his position on that list and, therefore, that intervenors' due process claims are without merit (A. 27c). The district court also found that the settlement did not impose an unlawful quota because the preference was *interim* in nature and was tailored to the specific claims of the plaintiff class. Finally, the court found that the settlement did not unnecessarily "trammel" the interests of non-minority employees because it did not require the discharge of any non-minority employees, did not create an absolute bar to their advancement, is a temporary mesaure, and is intended to eliminate a racial imbalance (A. 30c).

The Court of Appeals upheld the district court both with respect to its limitation on intervention and the approval of the settlement agreement.

In its opinion, the Court of Appeals first dealt with the question of the limit of intervention granted to non-minorities by the district court. The Court rejected the intervenors' rationale that had they been granted judicial intervention, they would have had equal standing with the original parties and, therefore, that their consent to the settlement agreement would have been required. Instead, the Court of Appeals agreed with the reasoning of the district court that the sum of rights possessed by an intervenor depends on the nature of the intervenor's interest (A. 14a).

The Court of Appeals stated that the intervenors were non-minorities and non-minorities "do not have a legally protected interest in the *mere* expectation of appointments which could only be made pursuant to presumptively discriminatory employment practices." (A. 14a). Therefore, the legal rights of non-minorities are generally not adversely affected by reasonable and lawful race-conscious hiring or promotional remedies, whether imposed by the court following litigation on the merits or created by settlement (A. 14a). The interests of non-minorities in such a situation then involve whether or not the decree or agreement is unreasonable or unlawful, but do not require their consent as a condition to settlement.* The Court of Appeals specifically stated that to enable all intervenors in Title VII cases to veto proposed compromises "would certainly hamper efforts to settle Title VII cases." (A. 15a).

* The Court distinguished the intervenors from the union in *United States* v. *City of Miami*, 664 F.2d 435 (5th Cir. 1981) (En banc) because the decree in *Miami* bound the defendant union to a compromise which altered its contractual rights while the intervenors had no such contractual rights (A. 18-19a).

The Court of Appeals next reviewed the propriety of the district court's approval of the settlement agreement. The Court began by stating that "It is settled that voluntary compromise is a preferred means of achieving Title VII's goal of eliminating discrimination." (A. 20a). The Court held that when such a settlement employs race-conscious remedies, a court must address itself to two inquiries: (1) whether there is an existing condition which can serve as a proper basis for a creation of race-conscious remedies, and (2) whether specific remedies are unreasonable or unlawful. The Court then addressed each of these inquiries (A. 21a).

The Court of Appeals agreed with the district court that the statistical demonstration of the eligibility list's disproportionate racial impact established a *prima facie* case of Title VII discrimination. The Court rejected the intervenors' contention that a judicial determination that the examination was not job-related was required before a proper basis for settlement could exist. According to the Court, intervenors' argument "would turn Title VII law on its head since, as intervenors themselves concede, job-relatedness is never presumed and only becomes an issue after it is raised by the defendant." (A. 23a). The Court also held that requiring that no Title VII testing case could be settled until a judicial determination on the test's job-validity was made would seriously "undermine Title VII's preference for voluntary compliance." (A. 23a). The Court of Appeals expressly stated that neither Title VII nor the Constitution prohibits compromise agreements employing race-conscious remedies which are agreed to prior to judicial determination on the merits (A. 23a). The Court

held that defendants' entrance into a compromise without rebutting an established *prima facie* case amounts to an admission of unlawful discrimination for purposes of Title VII (A. 25a).*

As for the second inquiry concerning the reasonableness and the legality of the specific remedies of the settlement, the Court of Appeals held that the inquiry must be answered by measuring the terms of settlement against the allegations of the complaint and the relief which might have been granted if the case went to trial. The remedies must be related to the objective of eliminating the alleged instance of discrimination and must not unnecessarily trammel the interests of affected third parties (A. 28-29a). Applying that standard to this case, the Court of Appeal found that the settlement was reasonable and legal since the terms of the settlement substantially related to the objective of eradicating the discriminatory impact caused by the examination and are not overly oppressive to the interests of non-minorities (A. 29a).

Specifically, the Court of Appeals reviewed the future selection procedures provided by the settlement and found that these procedures operated solely to eliminate adverse impact and to assure compliance with Title VII in the future and did not trammel on any interests of any minorities (A. 29a). The Court recognized that small differences between the scores of candidates indicate very little about the

* With respect to the disclaimer of any admission of unlawful discrimination used in the settlement, the Court of Appeals stated that such disclaimer is used in many compromises of this nature to protect defendants from making themselves available to large back-pay awards. Therefore, the Court construed the disclaimers to be an admission that there is a statistical disparity together with a reservation of the right to explain in the future (A. 25a).

candidates' merits and fitness, that the zones contained candidates whose final scores differed by no more than four points, and that the size of the zones was based on a statistical computation of the likely error measurement. The zoning, therefore, was proper since it created a more valid measure to assess the test scores and eliminated the central cause of adverse impact, the rank ordering system. The Court of Appeals went on to state that since the zone system preserves some of the results of the examination where an employer could have resorted to random selection from within the entire group, the use of zones may have had the least detrimental effect to the interest of minority candidates who obtained higher test scores (A. 30-31a).

The Court of Appeals rejected the intervenors' contention that use of zones deprives intervenors of vested property rights without due process of law. The Court referred to the New York Court of Appeals holding in *Cassidy* v. *Municipal Civil Service*, 37 N.Y.2d 526, 529 (1975) where the New York Court of Appeals held that a person on an eligibility list does not possess any mandated right of appointment or any other legally protected interest. The Court of Appeals below went on to state "the only relevant state right intervenors possess is the right to challenge the settlement on the ground that the manner in which it provides for appointments is unlawful, arbitrary, and capricious, or constitutes an abuse of discretion," which rights intervenors had exercised in the district court (A. 31-32a).

Finally, the Court of Appeals found that the race-conscious appointment procedures envisaged by the settlement were not unreasonable or illegal. The Court found that interim race-conscious procedures are acceptable when (1)

they mandate the appointment of members of the plaintiff class who are victims of the discriminatory practice and (2) they calculate the number of victims to be appointed by reference to the percentage of victims in the total applicant pool (A. 32-33a). According to the Court, "because such interim selection procedures do not go beyond the simple elimination of the challenged practice's disparate impact, they are not unlwaful quotas, and are justified whenever a Title VII violation has occurred." (A. 33a). The Court of Appeals reviewed the appointment procedures set forth in the settlement and found that they met these two criteria (A. 33-34a).

Summary of Argument

The Court below held that the Stipulation of Settlement entered into between minority plaintiffs and the New York State defendants, which resolved a Title VII class action litigation involving a promotional examination, was properly approved by the district court. The basis for the Court of Appeals' holding was that a *prima facie* case of discrimination was established by reason of a statistical disparity and that the terms of the settlement were fair, reasonable and legal in all respects.

Petitioners argue that a *prima facie* case is an insufficient and legally infirm basis upon which to settle a Title VII case and that there is a need to establish standards upon which to base settlement of Title VII litigation. However, courts, including this Court, have uniformly held that a *prima facie* case of discrimination is a proper basis for settling Title VII litigation. The standards which the courts have applied is that the terms of the settlement be

fair, reasonable and legal. The appeals court holding is, therefore, in no way unusual and certiorari should be denied.

ARGUMENT

The Court of Appeals Properly Upheld the Stipulation of Settlement Because a *Prima Facie* Case of Discrimination Has Been Clearly Established and the Settlement Reached Is Fair, Reasonable and Legal in All Respects.

The courts have consistently held that any settlement of a Title VII action shall be approved where a *prima facie* case of discrimination has been established and where the terms of the settlement are fair, reasonable and legal. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Plummer* v. *Chemical Bank*, 668 F.2d 654 (2d Cir. 1982); *Patterson* v. *Newspaper & Mail Deliverers' Union of N.Y. & Vicinity*, 514 F.2d 767 (2d Cir. 1975). In this case, as the Court of Appeals held, a *prima facie* case was established and the terms of the settlement were fair, reasonable and legal.

Here, the *prima facie* case was established by statistical evidence. It is now beyond dispute that a *prima facie* case of discrimination, which satisfies the plaintiff's burden of coming forward with evidence, is established by showing that the challenged practice, while race-neutral on its face, nonetheless has a disproportionate impact on a particular class. *Teal* v. *Connecticut*, 645 F.2d 133, 137 (2d Cir. 1980), *aff'd*, 457 U.S. 440 (1982); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Albemarle Paper Co. Moody*, 422 U.S. 405

(1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1970). A showing of adverse impact can be, and typically is, established by statistical evidence.

Where, as here, objections to settlement of a Title VII class action are raised by non-minorities whose interests will be affected by "benefits" granted to plaintiffs, the standard to be applied is that the terms of settlement must not be unreasonable or illegal. In applying this standard, reasonableness is considered in the context of whether or not the relief violates the non-minorities' rights under the Fourteenth Amendment of the United States Constitution. *United States* v. *City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc); *United States* v. *City of Alexandria*, 614 F.2d 1358, 1362-1363 (5th Cir. 1980).* In applying the standard to this case, then, the issue to be decided is whether the settlement violates either Federal or New York State law. As the Court of Appeals found, it did not.

Petitioners contend that terms of the settlement violate the Equal Protection clause of the United States Constitution and deprive them of vested property rights without due process of law. As the Court of Appeals found, both claims are without merit.

Petitioners' equal protection argument—that the race-conscious terms of the settlement constitute illegal, reverse

* Petitioners' reliance on the fact that certiorari was granted in *Memphis Fire Department* v. *Stotts*, 679 F.2d 541 (6th Cir. 1982), *cert. granted*, —— U.S. ——, 77 L. Ed. 2d 1331 (1983), to support their contention that certiorari should be granted in this case is misplaced. While *Stotts* is a Title VII case involving public employees which was settled, this Court granted certiorari only on the issue of the district court's authority to modify the consent decree and denied certiorari on the issue of the rights of non-minorities to intervention.

discrimination—must fail in light of the standards set forth in the cases dealing with affirmative action plans. First, an employer must demonstrate that such a plan was adopted for the purpose of remedying a past racial imbalance in its work force. *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 208 (1979). The employer's burden of showing a remedial purpose is met by showing that a plan was entered into as part of a settlement in a Title VII action. *Setser* v. *Novak Investment Co.*, 657 F.2d 962, 968 (8th Cir. 1981). Second, the remedy should not "unnecessarily trammel the interests of white employees" (*Weber*, 443 U.S. at 208), or, in other words, is a "reasonable" remedy. *City of Miami*, 614 F.2d at 1338; *Prate* v. *Freedman*, 583 F.2d 42 (2d Cir. 1978). As the Court of Appeals found, this settlement is eminently reasonable because (1) it ameliorates the past disproportionate impact of the examination without extending benefits to minorities beyond the plaintiff class, and (2) its detrimental impact on non-minorities is modest, especially relative to the detriment which might have resulted from a remedy imposed after trial.

The benefit to plaintiffs' class from the settlement amounts to reducing the adverse impact of the examination by the creation of zones and providing for race conscious hiring from within zones. However, when there are no minorities remaining in the zone eligible for appointment, non-minorities will be appointed even though this causes the proportion of minority appointees to fall below 21%.* Clearly, this relief is directly related to plaintiffs' claims

* It should be noted that since the proportion of minorities hired will fluctuate under the terms of the settlement, the settlement sets forth hiring goals and not quotas.

that the examination was discriminatory because a disproportionately low number of minorities had been appointed. Also, since the settlement does not completely eliminate the adverse impact of the examination on plaintiffs, the relief is modest.

As for any detriment to non-minorities on the list, first it must be recognized that the settlement benefits—in fact gives priority treatment to—certain of the non-minorities. Specifically, it provides, as the district court noted, that *all* non-minorities who have already received appointments, some 200 people, comprising 91% of those appointed to date, will continue to hold their appointments and the superior benefits afforded by those appointments. In addition, since the settlement requires that all persons on the eligible list receive an offer of appointment, non-minorities at the lower end of the list will have the opportunity of appointment assured as positions become available in the future.

As to petitioners' contention that no delay is warranted if the examination is job-related, it ignores the teaching of *Weber*, 443 U.S. 193, that affirmative action plans are constitutional.* In addition, it ignores the teaching of *Albemarle, supra*, 422 U.S. 405, that after a defendant has established that an examination is job-related, the case is not

* In this context, it should be noted that the Second Circuit has not yet held an examination to be job-related where the examination had an adverse impact and where the validation was a content validation. *Guardians Association* v. *Civil Service*, 630 F.2d 79 (2d Cir. 1980); *Jones* v. *N.Y.C. Human Resources Administration*, 528 F.2d 696 (2d Cir. 1976); *Kirkland* v. *N.Y.S. Dept. of Correctional Services*, 520 F.2d 420 (2d Cir. 1975); *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972).

over because then the plaintiff still has the opportunity to establish the availability of an alternative selection procedure which would have had less adverse impact. A number of Circuit Courts have struck down selection procedures where alternatives existed which had less adverse impact. In *United States* v. *Bethlehem Steel Corporation*, 446 F.2d 652 (2d Cir. 1971), the Court of Appeals modified seniority and transfer systems, holding that "[i]f the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued." *Id.* at 662. Again in the case of a seniority system, the Fourth Circuit held "[t]here must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971). See also, *Blake* v. *City of Los Angeles*, 515 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); *Horace* v. *City of Pontiac*, 624 F.2d 765, 768 (6th Cir. 1980); *Williams* v. *Colorado Springs, Colorado School District*, 641 F.2d 835 (10th Cir. 1981).

As for petitioners' due process claim, it is based on a misapprenhension of the law. Petitioners conclude, from the fact that New York law holds that they have an interest in the eligible list, that due process entitles them to defend the validity of the examination. No such conclusion can be drawn. The extent to which intervenors are entitled to due process depends entirely on how New York law defines their interest. *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

And, nowhere in New York law is there any holding that persons who feel themselves to be aggrieved by State action can put themselves in the shoes of the State.

Indeed, a case relied upon by intervenors, *Burke* v. *Sugarman*, 35 N.Y. 2d 39 (1974) (Althiser Petition at 21), defines the limits of intervenors' right. The only "right" that intervenors can derive from Burke is the right to challenge the settlement on grounds that the manner in which appointments will be made under its terms is contrary to law, arbitrary and capricious, or constitutes an abuse of discretion. As the Court of Appeals held, petitioners have already exercised that right in the district court.

Petitioners contend that the terms of the settlement violate New York State law. The terms of which they complain are zoning and race conscious appointments within zones. According to petitioners these terms violate the "merit and fitness" requirements of New York State's Constitution and Civil Service Law and the "rule of three" in the Civil Service Law. Petitioners are wrong. The terms of the settlement comply with New York law in all respects.

The "merit and fitness" requirements of New York law are that promotion shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive. New York State Constitution, Article 5, § 6; Civil Service Law, § 50. As the district court recognized, it is the zoning provisions of the settlement which relate to these "merit and fitness" requirements since it is zoning which changes the use of the results of the examination. And, as

the court held, zoning does not violate "merit and fitness" principles.

Specifically, the determination of what constitutes merit and fitness, and when and how it can be tested for, is vested in the Civil Service Commission. See *People ex rel. Buckley* v. *Roosevelt*, 19 App. Div. 431 (1st Dept. 1897); *Matter of Fitzgerald* v. *Conway*, 275 App. Div. 205 (3d Dept. 1949), *appeal denied*, 299 N.Y. 798 (1949). Here, the Commission had determined, when it certified the list in December 1981, that all those who passed Examination 36-808 met the requirements of merit and fitness. Since only those who passed the examination will be grouped in zones, the determination of the Commission concerning merit and fitness remains unchanged.

As for the requirements of competitiveness, it means simply that the results of an examination must be arrived at by use of an objective standard, capaable of review, and not by the subjective standards of the examiner. *Matter of Fink* v. *Finnegan*, 270 N.Y. 356 (1936); *Matter of Andresen* v. *Rice*, 277 N.Y. 271 (1938). The Civil Service Commission has broad discretion in determining what constitutes a competitive examination. *Matter of Katz* v. *Hoberman*, 28 N.Y. 2d 530 (1971); *Matter of Mitchell* v. *Poston*, 41 A.D. 2d 886 (4th Dept. 1973). And, various formulas can be used to determine the scores which measure objective standards. *Matter of Robbins* v. *Schechter*, 7 Misc. 2d 436 (Sup. Ct. N.Y. Co. 1957), *aff'd*, 3 A.D. 2d 1010 (1st Dept. 1957), *aff'd*, 4 N.Y. 2d 935 (1958); Section 67.1 of the President's Regulations, 4 NYCRR 67.1. Here, the zones, devised by a statistical formula, are an objective standard of measuring the results of the examination. They are, therefore, competitive.

As for the contention that the settlement violates the "rule of three", intervenors misstate the law. Intervenors state that "pursuant to Title 4 NYCRR § 4.2(a), appointments are made from among the top three ranking candidates on the eligible list" (Althiser Petition at 20-21). The language of § 4.2(a), on its face, is to the contrary. Section 4.2(a) states that a promotion may be made to any person on an eligible list whose final rating in the examination is equal to or higher than the rating of the third highest person on the list.* Therefore, if there are more than three people, be there four or a hundred, with the same final score and that score is equal to or higher than the final score of the third highest person on the list, any one of those people can be appointed.

The rule set forth in NYCRR § 4.2(a) is provided for in Civil Service Law, § 61, which is the source of the "rule of three". The purpose of the statute was to expand rather than restrict the appointing officer's choice and thus to insure that appointing officers, in fact, had the power of appointment. *People ex rel. Balcom* v. *Mosher,* 163 N.Y. 32 (1900). To that end, the statute further provides that the Civil Service Commission may provide, by rule, that where persons on an eligible list have the same final examination ratings, promotions may be made by the selection of any of those individuals. Section 4.2(a) of the Rules is the rule which has been adopted. The rule serves to en-

* The specific language of 4 NYCRR § 4.2(a) concerning appointments is:

> ". . . appointment or promotion to a position in the competitive class shall be made by the selection of a person on the appropriate eligible list willing to accept such appointment and whose final rating in the examination is equal to or higher than the rating of the third highest ranking eligible on the list indicating willingness to accept such appointment."

sure that mechanical "ranking" by a uniform impartial system *not* have the restrictive impact that petitioners claim is mandated. Here, the use of zones wherein all candidates have the same rating for purposes of appointment is in full accord with the purposes of the rule of three.

Petitioners also claim that changing the list violates their New York State due process rights. As the Court of Appeals held, that claim is without merit. In addition, the Commission regularly changes lists in its review of examinations. *Matter of Adolph* v. *Dept. of Personnel*, 71 Misc. 2d 68 (Sup. Ct. N.Y. Co. 1972), *aff'd*, 41 A.D. 2d 713 (1st Dept. 1973), *aff'd*, 33 N.Y. 2d 993 (1974); *Matter of Sullivan* v. *Taylor*, 285 App. Div. 638 (1st Dept.), *aff'd*, 309 N.Y. 927 (1955). And, as noted below, it does so in the context of settlements. The Commission has the clear and unmistakable power to take appropriate action to correct errors. *Katz* v. *Hoberman, supra; Mitchell* v. *Poston*, 41 A.D. 2d 886 (4th Dept. 1973). Such corrective action may include, for example, deletion of questions or acceptance of alternative correct answers, *Adolph, supra;* changing the passing grade, *Mulkeen* v. *Bronstein*, 75 Misc. 2d 110 (Sup. Ct. N.Y. Co.), *aff'd*, 43 A.D. 2d 664 (1st Dept. 1973); giving a supplemental test to some candidates, *Mitchell, supra.*

Indeed, petitioners acknowledge that the Civil Service Commission has the authority to alter eligible lists; they merely argue that the Commission cannot alter the list in this particular case (Althiser Petition at 21). It is axiomatic that under New York law the standard to be applied as to whether or not a State agency can exercise its authority is whether or not there is a "rational basis" for the agency action. *Colton* v. *Berman*, 21 N.Y. 2d 322

(1967); *Fink* v. *Cole,* 1 N.Y. 2d 48 (1956); *Diocese of Rochester* v. *Planning Board of Town of Brighton,* 1 N.Y. 2d 508 (1956); *Stork Restaurant, Inc.* v. *Boland,* 282 N.Y. 256, 274 (1940). Here, where the results of the examination had adverse racial impact and the use of zones ameliorates the standard error of measure with the concomitant effect of ameliorating the adverse racial impact of the examination, the use of zones is, at the very least, rational.

The fact that zones have been established in the context of settlement, after the list had been established, in no way invalidates the stipulation. Eligibility lists can be changed in the context of settlement. *Matter of Mena* v. *D'Ambrose,* 58 A.D. 2d 514 (1st Dept. 1977); *Mulkeen* v. *Bronstein, supra,* 75 Misc. 2d 110, *aff'd,* 43 A.D. 2d 664.

The fact that the settlement provides for race conscious hiring within the zones does not, as petitioners argue, render the settlement illegal under New York law. Both article 6, § 5 of the New York State Constitution and the Civil Service law including the "rule of three" are silent regarding the basis on which the appointing officer is to select from the list of individuals certified as having satisfied the merit and fitness requirement. As for the equal protection clause of the State Constitution, N.Y.S. Const. Art. 1, § 11, that clause affords the same breadth of coverage as the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Dorsey* v. *Stuyvesant Town Corp.,* 299 N.Y. 512 (1949), *cert. den.,* 339 U.S. 981 (1950). The applicable considerations are, therefore, those set forth in *Weber,* 443 U.S. 193, which considerations, intervenors concede, allow for race con-

scious hiring (Althiser Petition at 10). In addition, race conscious hiring within zones is in accord with New York State's policy of affirmative action. See Executive Order 40.1, 9 NYCRR § 3.40.

Reliance on *Ruddy* v. *Connelie*, 61 A.D. 2d 372 (3d Dept. 1975), for the proposition that a minority preference may not be granted is misplaced. The holding in *Ruddy* was based on the court's finding that there was no suggestion that the examination was inherently disadvantageous to minorities. *Id.* at 375. Furthermore, the appointing officer in *Ruddy* simply decided to appoint specific numbers of minority and female eligibles without in any way relating that decision to the actual configuration of the list.

Here, the record demonstrates that the examination had a disparate racial impact. In addition, the minority preference provided by the settlement is limited by the zone structure, as minorities are reachable only if there are fewer than three available eligibles remaining in the next higher zone. Thus, the use of zones regroups the examination results on the basis of this Court's analysis in *Guardians*, rather than disregarding them, and follows Civil Service principles, unlike the affirmative action plan in *Ruddy*.

Since the Stipulation of Settlement was based on a *prima facie* case of discrimination and the terms of the settlement were both reasonable and legal, the Court of Appeals properly upheld the settlement. Certiorari, therefore, should be denied.

Conclusion

The Petition for a Writ of Certiorari Should Be Denied.

Dated: New York, New York
December 22, 1983

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

BARBARA B. BUTLER
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Of Counsel

SUPPLEMENTAL APPENDIX

Affidavit of Ann Horowitz

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

82 Civ. 295

EDWARD L. KIRKLAND, *et al.*,

Plaintiffs,

against

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Defendants.

State of New York)
County of New York) ss.:

ANN HOROWITZ, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of ROBERT ABRAMS, Attorney General of the State of New York, attorney for defendants herein. I am familiar with the facts set forth herein and make this affidavit on personal knowledge in order to clarify the nature and extent of discussions between members of this office and counsel for plaintiffs.

2. Between January 19, 1982 and January 21, 1982, numerous telephone conversations were had between Assistant Attorney General Judith Gordon and/or myself and

D. Peter Sherwood, counsel for plaintiffs. I have spoken with Ms. Gordon regarding those conversations between Ms. Gordon and Mr. Sherwood to which I was not a party, and am able on that basis to make statements concerning the substance of those conversations. As a result of those conversations, Ms. Gordon and I understood that a settlement in principle had been reached as to administration of a new Captain's examination within a timeframe acceptable to plaintiffs, consultation with an expert designated by plaintiffs in the development of new examinations for lieutenant and captain, and payment of a fee to plaintiffs' expert. It was our belief that the only issue left for discussion was the possibility of "accelerated" promotions from the eligible list of minorities to permanent lieutenant positions. This issue was not raised until after tentative agreement on the other issue had been reached. Mr. Sherwood was advised that it was unlikely that defendants could agree to any sort of "accelerated" promotions.

3. On January 21, 1982 I advised Mr. Sherwood that 171 permanent appointments from the eligible list had been made, and that 17 of those appointments had been made to minorities. Later that day, Mr. Sherwood advised us that, based on the agreement in principle reached at that point, he would adjourn plaintiff's first motion for a preliminary injunction *sine die*.

4. Discussions concerning the details of settlement continued after January 21, 1982. At no point in settlement discussions, either before or after January 21st, did Mr. Sherwood raise the issue of retaining provisionals in place after permanent appointments had been made.

5. On February 16, 1982 Mr. Sherwood telephoned me at approximately 4 p.m. and asked me whether it was true that the provisional status of the provisional lieutenants was being terminated effective February 17, 1982. I confirmed that provisional status of all lieutenants was being terminated effective at the close of business on the 17th. Mr. Sherwood then advised me that he would be seeking a TRO from this Court on February 17, 1982 restraining defendants from interfering with the provisional lieutenant status of any of plaintiffs' purported class.

6. I would also like to address and clarify several points in Mr. Sherwood's affidavit dated February 16, 1982. I have been advised by the Department of Correctional Services that some candidates for the lieutenant exam were not sergeants and thus the reference in paragraph 3 should be to candidates, not sergeants, who sat for the exam. Similarly, not all provisional lieutenants were permanent sergeants. (See Sherwood Affidavit, ¶8). They have therefore been returned to their permanent hold items, some of which are not sergeant items. Finally, it should be noted that the sheet showing distribution of minorities within score ranges was provided to Mr. Sherwood with the caveat that it was subject to revision due to factors such as subsequent disqualifications (insufficient time in title), and errors in computation of veterans credits.

/s/ Ann Horowitz

Ann Horowitz

Sworn to before me this
24th day of February, 1982

/s/ Barbara B. Butler

Assistant Attorney General
of the State of New York